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12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN JOSE DIVISION

16 UNITED STATES OF AMERICA,

17 CASE NO. CR-12-00750-03-LHK

18 Plaintiff,

19 v.
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28
**DEFENDANT ELENA MORENO'S
SENTENCING MEMORANDUM**

16 ELENA MORENO, et al.,

17 Sentencing Date: January 21, 2015

18 Defendants.

19 Time: 9:30 a.m.

20 Judge: The Honorable Lucy Koh

TABLE OF CONTENTS

1	I.	INTRODUCTION.....	1
2	II.	BACKGROUND.....	1
3	A.	Elena Moreno.	1
4	B.	The Charges and Ms. Moreno's Guilty Plea.	3
5	C.	The Probation Office's Recommended Sentence.....	4
6	D.	Ms. Moreno's Requested Sentence.	5
7	III.	ARGUMENT	6
8	A.	The Court is Not Bound by the Guidelines and Must Instead Consider the Factors Enumerated in 18 U.S.C. 3553(a) to Determine a Proper Sentence.....	6
9	B.	Ms. Moreno's Requested Sentence Provides for Sufficient, But Not Greater Than Necessary, Punishment and Best Achieves the Goals of § 3553(a).....	7
10	1.	The Requested Sentence Reflects the Nature and Circumstances of the Offense.	7
11	2.	The Requested Sentence Will Avoid Unwarranted Sentence Disparities.....	11
12	3.	The Requested Sentence is Appropriate in Light of Ms. Moreno's History and Characteristics.	13
13	4.	The Requested Sentence Will Provide Just Punishment and There is Little Risk That Ms. Moreno Will Reoffend.	16
14	5.	The Requested Sentence Will Better Allow for Ms. Moreno to Provide Restitution to Victims of the Offense.	17
15	C.	Objections to Presentence Report.	17
16	1.	There is No Basis to Apply a Manager/Supervisor Enhancement.	17
17	2.	There is No Basis for the Presentence Report's Speculation that Ms. Moreno Has Had "Anger Management Issues."	20
18	3.	There Has Been an Insufficient Showing that Forfeiture, in Addition to Restitution, is Appropriate.	21
19	IV.	CONCLUSION	21

TABLE OF AUTHORITIES

Cases

3	<i>Gall v. United States</i> , 552 U.S. 38 (2007).....	6
4	<i>Kimbrough v. United States</i> , 552 U.S. 85 (2007).....	6
5	<i>United States v. Adelson</i> , 441 F. Supp. 2d 506 (S.D.N.Y. 2006).....	6
6	<i>United States v. Booker</i> , 543 U.S. 220 (2005)	6
7	<i>United States v. Brown</i> , 771 F.3d 1149 (9th Cir. 2014).....	21
8	<i>United States v. Lehmann</i> , 513 F.3d 805 (8th Cir. 2008).....	16
9	<i>United States v. Leon</i> , 341 F.3d 928 (9th Cir. 2003).....	17
10	<i>United States v. Luca</i> , 183 F.3d 1018 (9th Cir. 1999).....	21
11	<i>United States v. Menyweather</i> , 447 F.3d 625 (9th Cir. 2006).....	17
12	<i>United States v. Monaco</i> , 23 F.3d 793 (3d Cir. 1994).....	9
13	<i>United States v. Redemann</i> , 295 F. Supp. 2d 887 (E.W. Wis. 2003)	9
14	<i>United States v. Rostoff</i> , 53 F.3d 398 (1st Cir. 1995).....	9
15	<i>United States v. Whitney</i> , 673 F.3d 965 (9th Cir. 2012)	19
16	Statutes & Guidelines	
17		
18	18 U.S.C. § 3553	passim
19	U.S.S.G. § 2B1.1	9, 10

I. INTRODUCTION

2 Defendant Elena Moreno stands before this Court for sentencing after entering a guilty
3 plea to tax fraud conspiracy and bank fraud conspiracy. Ms. Moreno accepts responsibility for her
4 actions and struggles mightily with how to reconcile her crimes with the values of honesty and
5 integrity she tries to impart daily to her children. She deeply regrets letting them down, harming
6 society, and turning her back on her core principles. Recognizing that she must pay the price for
7 her misconduct she also agonizes over how to care for her dependents in view of the impending
8 incarceration of her, her husband, and her brother-in-law. Seldom does a case present such a
9 decimation of a once-thriving, closely-knit family. While Ms. Moreno understands that the
10 unhappy circumstance she finds herself in is the result of her own wrongdoing, she nonetheless
11 implores the Court to vary downward from the severe guideline range applicable to Ms. Moreno's
12 case and sentence her to a term of incarceration not exceeding 12 months and one day. For the
13 reasons described further herein, there is no legitimate sentencing purpose that would be achieved
14 by incarcerating Ms. Moreno in excess of this proposed sentence, and the requested sentence is
15 sufficient but not greater than necessary to reflect the seriousness of her conduct, promote respect
16 for the law, and create parity among similar defendants, while minimizing the displacement and
17 hardship that her dependents will experience as a result of the incarceration of both of their
18 parents/caretakers.

II. BACKGROUND

A. **Elena Moreno.**

21 This case involves multiple generations of a family riven by poverty and displacement –
22 that rose out of drug and alcohol addiction and domestic violence to stability – only to be torn
23 apart because they put their craving for the full trappings of a middle class lifestyle above prudent,
24 careful, and honest decision making.

25 Ms. Moreno is 40-years old and was the fourth of seven children. Dkt. No. 111
26 (hereinafter “PSR”) ¶ 57. She grew-up in a two-bedroom apartment with her siblings in a home
27 riddled with traumatic physical and verbal abuse by her alcoholic father. *Id.* at ¶¶ 58-60, 65. As a

1 result of the abuse, Ms. Moreno's parents separated and Ms. Moreno dropped out of high school.
 2 *Id.* at ¶ 60. Looking for an escape, Ms. Moreno started dating her husband Fidencio – 12 years her
 3 senior – when she was 16 years old. *Id.* at ¶ 62. Instead of an escape, Ms. Moreno found herself
 4 living with a husband who, like her father, was abusive and a serious alcoholic. *Id.* By the time
 5 she was 18, Ms. Moreno had two children. *Id.*

6 Despite this difficult beginning, both Ms. Moreno and her husband found religion and
 7 through that avenue, found solace, inspiration and true community. Through the help of their
 8 church, Fidencio stopped abusing drugs and alcohol and found employment as a bus driver. He
 9 was good at his work and this, in turn, helped him gain self-respect and put an end to self-abuse
 10 and the abuse of his young wife. Eventually, with money lent to him by his mother, Fidencio and
 11 his brother (Arturo) started their own bus company, Quality Assurance Travel, in 2002. About
 12 four years after Quality Assurance Travel was started, Ms. Moreno left her job as a receptionist
 13 and joined the family business. PSR ¶¶ 75-78. Ms. Moreno continued as a receptionist – which
 14 was the job she had worked in for over 10 years – but also took on some of the billing and
 15 bookkeeping responsibilities at QAT. PSR ¶ 75; Dkt. No. 101 at p. 4.

16 Today, Ms. Moreno lives with her husband Fidencio, two daughters (ages 5 and 11), son
 17 Eddie Angel (age 22), and mother-in-law and father-in-law (ages 74 and 77). PSR ¶ 62. Ms.
 18 Moreno's second oldest child, James (age 21), is currently in college and will be the first member
 19 of the family to graduate college. *Id.* Ms. Moreno is the primary caretaker for her two daughters
 20 and elderly in-laws and continues to work at QAT.¹

21 Church has been the cornerstone to Ms. Moreno's life after it helped her husband recover
 22 from his addictions and Ms. Moreno and her husband have endeavored to help and support other
 23 members of their community who struggle with the problems that once plagued them. Ms.
 24 Moreno serves as a mentor in the Celebrate Recovery 12-step program, provides couples

25
 26 ¹ A description of the dependents at issue in this case, as well as a proposed family plan for when
 27 the defendants are incarcerated, was previously provided to the Probation Office. A copy of this
 28 submission is attached as Exhibit A.

1 counseling, volunteers as a Sunday School teacher and child care provider, and also performs
 2 church outreach. PSR ¶ 63.

3 **B. The Charges and Ms. Moreno's Guilty Plea.**

4 Life changed for the extended Moreno family on July 14, 2010 when heavily-armed IRS
 5 and federal agents burst into their business office shouting: "Where are the guns! Where are the
 6 drugs!" There were never guns or drugs so none were found but what followed was a lengthy
 7 investigation culminating into an indictment which included Ms. Moreno who, unlike her husband
 8 and husband's brother, had not been represented by counsel in the investigative phase.

9 The original indictment in the above-captioned matter was filed on October 18, 2012 and
 10 alleged tax fraud conspiracy and filing a false tax return against Ms. Moreno, her husband
 11 Fidencio, and her brother-in-law Arturo. Dkt. No. 1. Trial was originally scheduled for October
 12 28, 2013; however, at government counsel's request, this trial date was continued to March 10,
 13 2014 to accommodate a personal scheduling issue. Dkt. No. 49.

14 Two months before trial, the government obtained a superseding indictment which added
 15 bank fraud/wire fraud conspiracy and other charges related to mortgage fraud. Dkt. No. 64. The
 16 superseding indictment also added a criminal forfeiture allegation with respect to the new
 17 mortgage fraud charges. The case expanded significantly and the punishment that followed
 18 increased significantly. The threat of deportation of Ms. Moreno's husband, who came to this
 19 country when he was 14, loomed large over the pre-plea proceedings.

20 As part of a wired plea deal eventually reached with her husband and brother-in-law, Ms.
 21 Moreno plead guilty to tax fraud conspiracy (Count One) and bank fraud conspiracy (Count
 22 Thirteen) before a new trial date was set. *See* Dkt. No. 101.

23 With respect to Count One, Ms. Moreno admitted that while she worked at the family bus
 24 company, Quality Assurance Travel, she was part of a tax fraud conspiracy with her husband and
 25 brother-in-law wherein they failed to report all of their cash receipts to the IRS, resulting in a tax
 26 loss of \$214,618 over the course of five years.

27 With respect to Count Thirteen, Ms. Moreno admitted that she was a part of a bank fraud
 28

1 conspiracy with her husband and brother-in-law wherein they made false statements to lenders
 2 when obtaining loans to purchase homes for themselves and mother-in-law in the end of 2005 to
 3 the beginning of 2007 and made false statements when seeking to modify their loans in 2011 and
 4 2012 when they fell behind on their mortgage payments. In total, the bank fraud conspiracy
 5 involved five pieces of real property – 7535 Bayliss Place (“Bayliss”), 5937 Hillview
 6 (“Hillview”), 5839 Chesbro Avenue (“Chesbro”), 5832 Cadiz Drive (“Cadiz”), and 356 Lincoln
 7 Avenue (“Lincoln”). Ms. Moreno had a property interest in two of the properties (Bayliss and
 8 Hillview), both of which she lived in, but did not have a property interest in the others, which
 9 either her mother-in-law lived in (Chesbro) or brother-in-law lived in (Lincoln and Cadiz).
 10 Ultimately, Ms. Moreno’s former home (Bayliss) was short sold and her mother-in-law’s home
 11 (Chesbro) was foreclosed upon. The Probation Office has determined that these events caused a
 12 loss of \$219,000 to Wells Fargo Bank and NationStar Mortgage (who had taken over the Chesbro
 13 loan from Lehman Brothers Bank). PSR ¶¶ 20-22.

14 In the plea agreement, the parties agreed that the combined offense level for Count One
 15 and Count Thirteen was either 20 or 21, depending on if the Court applied the supervisor/manager
 16 enhancement for the bank fraud conspiracy. Dkt. No. 101 at 8-10. The advisory Guidelines range
 17 for Ms. Moreno (presuming Criminal History Category I) under the plea agreement is accordingly
 18 33-41 months or 37-46 months. The government agreed, however, that Ms. Moreno would be
 19 permitted to argue for a variance based on § 3553(a) factors. *Id.* at 8.

20 The Morenos fully paid restitution (\$214,618) for the tax fraud related conduct prior to
 21 pleading guilty and have been working to save money to pay the bank fraud restitution.

22 **C. The Probation Office’s Recommended Sentence.**

23 The Probation Office determined the combined offense level for Count One and Count
 24 Thirteen to be offense level 24 and has calculated the applicable Guidelines range as 51 to 63
 25 months. PSR at p. 25. The Probation Office, however, correctly recognizes that a number of
 26 mitigating factors warrant a downward variance under 18 U.S.C. § 3553(a) and ultimately
 27 recommends a sentence of 37 months, in addition to three years of supervised release, restitution
 28

1 of \$219,000, and forfeiture (of an unspecified amount/interest in money and real property). PSR
 2 at pp. 25-26.

3 **D. Ms. Moreno's Requested Sentence.**

4 While Ms. Moreno appreciates the Probation Office's recognition that a downward
 5 variance is warranted based on Ms. Moreno's personal life history and family obligations, the
 6 Probation Office has not explained its rationale for choosing 37 months, nor how such a sentence
 7 is not greater than necessary to serve the sentencing goals enumerated in 18 U.S.C. § 3553(a) (just
 8 punishment, adequate deterrence, protection of the public). Further, the Probation Office does not
 9 appear to have considered the unwarranted sentencing disparities that would result if Ms. Moreno
 10 is sentenced to 37 months. As detailed further below, Ms. Moreno respectfully posits that a
 11 sentence of 12 months and one day, followed by a term of supervised release for three years, and
 12 restitution to be determined by the Court, is an appropriate sentence that is sufficient but not
 13 greater than necessary to meet the sentencing goals enumerated in 18 U.S.C. § 3553(a).

14 Regardless of the sentence imposed, each of the defendants has a responsibility for
 15 ensuring that the seven dependents who will be impacted by the Morenos' incarceration are cared
 16 for. They have developed a family plan to address this overriding concern. *See Exhibit A.* As
 17 part of implementing this plan, Ms. Moreno respectfully requests that her sentence of incarceration
 18 be staggered consecutively with any term of incarceration to be served by her husband Fidencio
 19 Moreno and brother-in-law Arturo Moreno (who are both scheduled to be sentenced by this Court
 20 on February 4, 2015). If Ms. Moreno is incarcerated simultaneously with her husband brother-in-
 21 law, the Morenos' juvenile and elderly dependents are at great risk of having their basic living needs
 22 go unmet. The appended family plan explains her family's need for staggered consecutive
 23 sentences and details how the Morenos plan to work together to support the seven individuals (five
 24 children ages 1, 5, 5, 7, 11 and two elderly parents ages 74 and 77) who are fully dependent on
 25 Ms. Moreno, her husband, and her brother-in-law and to support the defendants' partial
 26 dependents despite incarceration. The government has explicitly promised that it does not oppose
 27 this request for staggered sentencing. Dkt. No. 101 at 13.

28

III. ARGUMENT

A. The Court is Not Bound by the Guidelines and Must Instead Consider the Factors Enumerated in 18 U.S.C. 3553(a) to Determine a Proper Sentence.

As the Supreme Court held in *United States v. Booker*, 543 U.S. 220 (2005) and clarified and reiterated in *Gall v. United States*, 552 U.S. 38, 59 (2007) and *Kimbrough v. United States*, 552 U.S. 85, 101 (2007), the Sentencing Guidelines are advisory only and a sentencing court must consider all of the factors enumerated in 18 U.S.C. 3553(a), not just the Guidelines, in determining a sentence that is “sufficient, but not greater than necessary” to meet the goals of sentencing. Moreover, a sentencing court may not presume that a Guidelines range is reasonable or accord more weight to the Guidelines than the other § 3553(a) factors. *Gall*, 522 U.S. at 50 (upholding the district court’s downward variance from the Guidelines range of 30 to 37 months imprisonment to 36 months of probation based on § 3553(a) factors). In fact, in certain circumstances, a court must place greater emphasis on the non-Guidelines factors under § 3553(a) in order to deliver a sentence “that comports with federal law.” *See United States v. Adelson*, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006) (noting the “utter travesty of justice that sometimes results from the guidelines’ fetish with the absolute arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense.”)

Under 18 U.S.C. § 3553(a), the Court must consider several factors in determining what type and length of sentence is sufficient, but not greater than necessary, to comply with the statutory directives set forth therein. An appropriate sentence must: (A) reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense; (B) afford adequate deterrence to criminal conduct; (C) protect the public from further crimes of the defendant; and (D) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. *See* 18 U.S.C. § 3553(a). Additionally, in determining the minimally sufficient sentence, § 3553(a) further directs sentencing courts to consider: (1) “the nature and circumstances of the offense and the history and characteristics of the defendant;” (2) “the kinds of sentences available;” (3) “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found

1 guilty of similar conduct;” and (4) “the need to provide restitution to any victims of the offense.”
 2 18 U.S.C. § 3553(a). Consideration of these factors in Ms. Moreno’s case dictates strongly in
 3 favor of a significant downward variance from the Guidelines range.

4 **B. Ms. Moreno’s Requested Sentence Provides for Sufficient, But Not Greater Than
 5 Necessary, Punishment and Best Achieves the Goals of § 3553(a).**

6 **1. The Requested Sentence Reflects the Nature and Circumstances of the
 7 Offense.**

8 The bank fraud conspiracy that Ms. Moreno was a part of was a conspiracy of three family
 9 members who obtained home loans for themselves and their elderly dependents.² As the
 10 government itself has acknowledged, the loans at issue in this case were subprime, interest-only
 11 loans. Dkt. No. 77 at 13. These loans were obtained with the assistance of mortgage brokers in
 12 the years immediately preceding the 2008 financial crisis (end of 2005 to the beginning of 2007).
 13 See PSR ¶¶ 15-17.

14 Ms. Moreno fully accepts that the losses ultimately suffered by the banks when her former
 15 home (Bayliss) was short sold and her mother-in-law’s home (Chesbro) was foreclosed were the
 16 result of false statements on her and her husband’s loan applications. However, like many
 17 Americans who took out subprime “liar” loans during the same time period, Ms. Moreno did not
 18 anticipate the housing crash and at no time expected or wished for her family to go underwater on
 19 their mortgages.³ Instead, Ms. Moreno engaged in the dishonest scheme because she wanted

20
 21 ² Since the Probation Office has determined Count Thirteen (bank fraud conspiracy) has an
 22 adjusted offense level of 26 and has determined that Count One (tax fraud conspiracy) has an adjusted
 23 offense level of 18, Count Thirteen’s adjusted offense level is largely determinative of the Probation
 24 Office’s ultimate sentencing recommendation, as Count One only results in a one-level increase to Ms.
 25 Moreno’s offense level under the “multiple count adjustment” calculations. PSR at ¶¶ 28-43.
 26 Accordingly, the bank fraud conspiracy is discussed first and foremost.

27 ³ The widespread practice of steering minority borrowers into subprime mortgages in the years
 28 leading up to the financial crisis has been the subject of numerous lawsuits and enforcement actions. See,
 e.g., DOJ Press Release, *Justice Department Reaches Settlement with Wells Fargo Resulting in More Than
 \$175 Million in Relief for Homeowners to Resolve Fair Lending Claims* (July 12, 2012), available at
<http://www.justice.gov/opa/pr/justice-department-reaches-settlement-wells-fargo-resulting-more-175-million-relief>; American Civil Liberties Union, “Justice Foreclosed: How Wall Street’s Appetite for
 (footnote continued)

1 provide a place for her family to live safely and securely and sought to reap the newly found
 2 financial stability her family was experiencing. With the prodding assistance of mortgage brokers,
 3 Ms. Moreno did what many did at that time in our history – wittingly made false statements to get
 4 the loans while thinking that no harm would follow.⁴ Ms. Moreno admits that this was foolish,
 5 stupid, greedy, and entirely her fault.

6 In retrospect, Ms. Moreno recognizes that the loans that her family had taken out were not
 7 sustainable and her family's ability to stay afloat on the loans depended on home prices continuing
 8 to climb. They were over-extended and should never have tried to take on new homes. Given her
 9 limited education and understanding of real estate, however, Ms. Moreno failed to fully appreciate
 10 the risk of taking on interest-only subprime loans during the quickly accelerating real estate
 11 bubble. Like the millions of Americans whose homes were foreclosed or short-sold, Ms. Moreno
 12 did not intend or expect that she would be unable to pay her mortgage.⁵ The dynamic presented
 13 by this historical and personal context provides a substantial basis for a downward variance from a
 14 Guidelines sentence. *See United States v. Monaco*, 23 F.3d 793, 799 (3d Cir. 1994) (explaining
 15 that unanticipated proximate causes, such as a subsequent bankruptcy, may result in
 16 “overstatement of criminality by the loss tables” and may warrant a sentence lower-than-
 17 Guidelines sentence); *United States v. Redemann*, 295 F. Supp. 2d 887, 899 (E.W. Wis. 2003)
 18 (explaining a below-Guidelines sentence may be warranted where “the amount of loss is the
 19 product of several sources (e.g., an economic downturn, a market collapse, or negligence by the
 20

21 Subprime Mortgages Ended Up Hurting Black and Latino Communities” (October 2012), *available at*
 22 <https://www.aclu.org/files/assets/justiceforclosed-singlepage-rel4.pdf>.

23 ⁴ As far as the defense is aware, there has been no investigation of the role of the mortgage brokers
 24 in the conspiracy, despite highly irregular and questionable business practices underlying the underwriting
 25 of the loans.

26 ⁵ From Q4 2007 to 2012, more than 500 California families lost their homes to foreclosure *every*
 27 *day*. *See* Center for Responsible Lending, “California Foreclosure Statistics: The Crisis is Not Over” (April
 28 2012) at 1, *available at* <http://www.responsiblelending.org/california/ca-mortgage/research-analysis/California-Foreclosure-Stats-April-2012.pdf>. Latinos accounted for 22% of all loans made between 2004
 and 2008, but 37% of the foreclosures. *Id* at 2.

1 victims), in addition to the defendant's conduct.”) (citing *United States v. Rostoff*, 53 F.3d 398,
 2 406-08 (1st Cir. 1995)).⁶

3 Although a sentence of 12 months and one day represents a significant downward
 4 variance from the Guidelines range, the Guidelines sentence for Ms. Moreno is based on fraud
 5 guideline § 2B1.1, which does not accurately reflect the nature and circumstances of her offense.
 6 As discussed, the *severity* of the financial loss suffered by the bank victims in this case were in
 7 large part due to financial factors outside Ms. Moreno's understanding and control and the
 8 requested sentence better reflects this. Indeed, § 2B1.1 has been the subject of a crescendo of
 9 criticism in recent years for failing to appropriately take into account an individual defendant's
 10 culpability. *See, e.g.*, Leah McGrath Goodman, *Nonsensical Sentences for White Collar*
 11 *Criminals*, Newsweek, June 26, 2014, available at <http://www.newsweek.com/2014/07/04/nonsensical-sentences-white-collar-criminals-256104.html>. Significantly, only half of sentences
 12 for financial fraud offenses in recent years fall within the recommended Guidelines ranges, as
 13 compared to 83.4% of sentences in 2003. *Id.*

15 The American Bar Association Criminal Justice Section Task Force on the Reform of
 16 Federal Sentencing for Economic Crimes (consisting of five professors, three federal judges, six
 17 practitioners, two organizational representatives, and observers from the DOJ and the Federal
 18 Defenders) has grappled with the problems posed by § 2B1.1 since April 2013 and recently issued
 19 a proposal on how § 2B1.1 might be revised to better take into account the culpability of an
 20 individual defendant and any victim impact. *See* American Bar Association Criminal Justice
 21 Section, *A Report on Behalf of the American Bar Association Criminal Justice Section Task Force*
 22 *on the Reform of Federal Sentencing for Economic Crimes* (November 10, 2014), available at
 23 http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/economic_crimes.au
 24 thcheckdam.pdf. Under the ABA Task Force's proposal, Ms. Moreno – a first time offender in

25 _____
 26 ⁶ Although the aforementioned cases arose in the context of downward departures, the same logic
 27 applies for a variance to a sentence lower than called for by the applicable Guidelines range.

1 Criminal History Category I – would likely be sentenced to an offense level of no greater than 10,
 2 which corresponds to a Guidelines range of 6 to 12 months. *Id.* at p. 10.

3 The spike in the base offense level to offense level 24 under § 2B1.1(b)(16)(D) – which
 4 applies when a defendant received over \$1 million in gross receipts – is just one example of how
 5 the Guidelines are excessively punitive in this case. *See* PSR ¶ 34. The perverse way in which
 6 strict adherence to § 2B1.1 plays out is not only a +2 enhancement (which Ms. Moreno agreed
 7 should apply for Guidelines purposes) but also a spike to offense level 24 (which she did not agree
 8 to and is not part of her plea agreement).⁷ Such punishment is excessive and does not reflect the
 9 specific characteristics of Ms. Moreno’s crimes. While Ms. Moreno technically “received” over
 10 \$1 million in gross receipts in the sense that she and her husband were given mortgage loans to
 11 purchase their family residences (Bayliss, then Hillview), the Guidelines contemplate treating their
 12 receipt of these home loans to be of the same culpability as an individual who embezzled and
 13 pocketed over \$1 million.

14 Ms. Moreno’s requested sentence also takes into account the nature and circumstances of
 15 her role in the tax fraud conspiracy – which involved the same three family members as the
 16 mortgage fraud: Ms. Moreno, her husband, and her brother-in-law. PSR ¶ 10. As part of the
 17 conspiracy, the defendants failed to report certain cash fares received by the family business
 18 (Quality Assurance Travel) from bus passengers traveling to/from Chukchansi Casino in
 19 Coarsegold, California. *Id.* at ¶ 11. Because these cash fares were not reported on the family
 20 business’ tax return, the defendants’ income tax returns underreported their taxable income. *Id.* at
 21 ¶ 10. Notably, however, although the unreported income was for tax years 2005, 2006, 2007,
 22 2008, and 2009, Ms. Moreno did not begin working at Quality Assurance Travel until 2006 and
 23 was out on maternity leave from December 2008 to February 2010. *See* PSR ¶ 75; Dkt. No. 101 at

24

25 ⁷ Ms. Moreno’s plea agreement with the government only applied the +2 level enhancement under
 26 this provision and did not apply the offense level spike to 24. Dkt. No. 101 at p. 9. It appears that in at
 27 least two other recent cases in the Northern District, the Probation Office has recommended the +2
 enhancement under 2B1.1(b)(16)(D) without applying the offense level spike. *See United States v. Besser,*
 CR-12-875 WHA; *United States v. Nimer Anton Massis*, CR-13-666 EMC.

1 ¶ 4. This strongly suggests a scheme that, once started, continued without any involvement by
 2 Ms. Moreno.

3 Over the course of the five years of the conspiracy, the defendants' unsophisticated cash-
 4 skimming scheme resulted in unpaid taxes totaling \$214,618 (\$112,693 for Ms. Moreno and her
 5 husband's joint taxes and \$101,925 for her brother-in-law's taxes). *Id.* at ¶¶ 12-14. The Morenos
 6 have fully accepted responsibility for their inexcusable failure to pay these taxes and worked hard
 7 to pay the restitution in full prior to pleading guilty in this case. Dkt. No. 101 at 10. As discussed
 8 further below, equivalent tax losses in similar cases have resulted in sentences far below the
 9 applicable Guidelines range and Ms. Moreno's requested sentence of 12 months and a day would
 10 best reflect the nature and circumstances of both the bank fraud conspiracy and the tax fraud
 11 conspiracy.

12 **2. The Requested Sentence Will Avoid Unwarranted Sentence Disparities.**

13 Under § 3553(a), a sentencing court must consider "the need to avoid unwarranted
 14 sentencing disparities among defendants with similar records who have been found guilty of
 15 similar conduct." 18 U.S.C. § 3553(a)(6). Even after application of the Probation Office's
 16 suggested variance, the Probation Office's ultimate recommendation of a 37 month term of
 17 incarceration vastly exceeds sentences imposed on mortgage fraud defendants in our district, none
 18 of whom were individuals accused of mortgage fraud with respect to personal home loans or home
 19 loans for family members.⁸ For example:

20 • *United States v. Jacqueline Besser*, Case No. CR-12-875 WHA. The defendant applied
 21 for a small business loan of \$1.75 million and a \$100,000 credit line but failed to
 22 disclose debt in applying for the loan and credit line. The total loss was determined by
 23 the court to be \$1,179,525.22. Although the parties agreed the appropriate Guidelines
 24 range was 41-51 months, the sentencing judge varied downward under § 3553(a) to 3

25
 26 ⁸ As previously described, the bank fraud conspiracy is largely determinative of the Guidelines
 27 range and the Probation Office's ultimate sentencing recommendation and is accordingly discussed first.
 28

months custody (and 200 hours of community service and a requirement that the defendant give speeches about her offense to at least 100 people).

- *United States v. Jeanie Cusing*, Case No. CR-10-156 SI. The defendant was a real estate professional who paid for forged documents and used those documents to assist borrowers to obtain mortgage loans. The parties agreed the loss was between \$200K and \$400K. The defendant was sentenced to 4 months custody.
- *United States v. Marilyn Infante*, Case No. CR-10-115 WHA. The defendant was a loan officer at Washington Mutual who conspired with others to submit false information in support of mortgage loan applications to make applicants appear more qualified for loans than they were. The loss as a result of the defendant's fraud was determined to be \$595,678.65. Prior to sentencing, the defendant also wired \$345,000 to the Philippines without advising the Court, pretrial services, Probation, or the government. The defendant was sentenced to one year and one day.
- *United States v. Hudson Rezende*, Case No. CR 10-0692 CRB. Mr. Rezende solicited at least twenty false tax returns and/or verifications of bank deposits, then submitted them to mortgage lenders to obtain loans for his clients. The parties agreed the loss amount was between \$70K and \$120K. Mr. Rezende received a sentence of six months in prison.
- *United States v. Vera Santos & John Vieira*, Case No. CR-10-0300 WHA. Ms. Santos was a licensed tax preparer who prepared several false tax returns for submission to mortgage lenders. Mr. Vieira was a bank employee who prepared false verifications of deposit. The sentencing court found a loss amount of \$161,149. Both defendants were sentenced to probation.
- *United States v. Judy Yeung*, Case No. CR-09-0376 SI. The defendant was convicted at trial of conspiracy to commit wire fraud, eight counts of wire fraud, and three counts of witness tampering. She engaged in a mortgage fraud conspiracy with two mortgage brokers to recruit straw buyers to submit applications for loans totaling more than \$6.5

1 million. Despite a loss calculation that produced an advisory sentencing range of 87 to
 2 108 months, Ms. Yeung was sentenced to 24 months in prison.

3 Similarly, recent cases in our district have imposed sentences significantly lower than
 4 called for by the Guidelines in tax fraud cases as follows:

5 Case	6 Docket No.	7 Judgment Date	8 Tax Loss	9 Term of Incarceration
<i>United States v. Desai</i>	CR-11-846 EJD	7/7/2014	\$378,009	6 months
<i>United States v. Kenny</i>	CR-13-495 WHA	2/11/2014	\$199,493	6 months
<i>United States v. Jiang</i>	CR-11-857 LHK	10/23/2013	\$467,366	16 months
<i>United States v. McGrath</i>	CR-11-158 JSW	10/4/2012	\$148,693	4 months

10 Notably, each of the tax losses listed above were attributable to a single defendant; whereas, in the
 11 instant case, the \$214,618 tax loss (all of which has since been repaid) is attributable to three
 12 defendants.

13 The requested sentence of 12 months and one day would be more consistent with the
 14 sentences handed down in similar cases and take into account Ms. Moreno's personal history and
 15 characteristics and the specific nature and circumstances of the offense. An adoption of the
 16 Probation Office's recommended sentence of 37 months would still exceed the sentences meted
 17 out to defendants involved in far more complex fraud schemes with exponentially higher loss
 18 amounts. *See, e.g., United States v. Waqar*, Case No. CR-11-464 PJH (defendant who defrauded
 19 his employer out of over \$1.8 million by hiring fake employees and who failed to pay \$142,530 in
 20 taxes sentenced to 33 months); *United States v. Aspillera*, Case No. CR-09-1102 SI (defendant
 21 who stole \$1.77 million from her employer and failed to pay \$644,843 in back taxes sentenced to
 22 30 months). In light of the substantial mitigating factors under § 3553(a), the Probation Office's
 23 recommended sentence would create a vastly unwarranted sentencing disparity.

24 **3. The Requested Sentence is Appropriate in Light of Ms. Moreno's History and
 25 Characteristics.**

26 As noted by the Probation Office, Ms. Moreno's personal history is rife with mitigating
 27 factors. PSR at ¶ 102. Nonetheless, despite a difficult youth, Ms. Moreno has no criminal
 28 convictions, has been consistently employed for the last nineteen years, is a devoted wife,
 daughter, and mother of four, and has given back to her community by serving as a mentor in

1 Celebrate Recovery (a community and church-based 12 step program), teaching Sunday School at
 2 her community church, and volunteering in her church's child care and outreach program. PSR ¶¶
 3 59-60, 62-63, 65, 74-78, 102; Exhibits C-R (letters of support).

4 Not only do Ms. Moreno's pastor, family members, coworkers, and friends universally
 5 identify Ms. Moreno as an individual who is committed to serving her community, but they
 6 describe a person who is a critical anchor for her children and extended family. *See, e.g.*, Exhibit
 7 C (Letter from James Moreno) ("My mom is making a difference in the community with her love.
 8 A love that she credits God for giving her. Her love not only has helped keep me emotionally
 9 secure growing, but it has changed me so much that I want to love people the way she does.");
 10 Exhibit D (Letter from Alma Morales) ("Elena is a wonderful wife, although her marriage was not
 11 always perfect, she hung in there . . . She is a mother of four, a great mom who knows how to
 12 discipline her children, doesn't over spoil them and keeps them on check. Her children are very
 13 well-behaved and extremely respectful."); Exhibit G (Letter from Cora Mancuso) ("[S]he is a very
 14 loving woman who is very dedicated to her family, friends, work and church. She will put others
 15 first before herself."); Exhibit H (Letter from Erika Espericueta) ("Another good quality of my
 16 aunt and uncle is that [they] are devoted parents, good parents. They have always been there for
 17 their kids and made sure they got the most out of life. They have raised their kid to be a split
 18 image of who they are. All of her kids were raised to be kind, loving, and respectable people.
 19 They have taught them good values of life. Not only are they great parents to them but I consider
 20 them to be my second parents."); Exhibit I (Letter from Gloria Bustos) ("I believe Eric and Elena
 21 are very good parents and not only to their own children but to others as well. I for one am
 22 thankful for that.").

23 A lengthy term of incarceration will do little except to punish further Ms. Moreno's
 24 dependents for Ms. Moreno's actions, which she deeply regrets. Ms. Moreno's daughters (ages 5
 25 and 11) and her elderly in-laws (ages 74 and 77), are fully dependent on Ms. Moreno and her
 26 husband. PSR ¶¶ 62, 102. Ms. Moreno is the person who wakes them up in the morning, makes
 27 their breakfast, attends teacher conferences, takes the young and old ones to doctor appointments,
 28

1 makes sure their clothes are clean, homework is done and bedtime met. Ms. Moreno's college-age
 2 sons are also partially dependent on Ms. Moreno and her husband for support. Her son James,
 3 who will be the first one in the extended Moreno family to graduate from college, has been so
 4 concerned about his family that he offered to drop out of school and come home. Her other son,
 5 Eddie Angel, did drop out in the midst of this family crisis despite Ms. Moreno's pleas that he stay
 6 in school. Her in-laws, now also her charges, have suffered health set-backs, including chronic
 7 obstructive pulmonary disease and heart surgery and are even more reliant than they were before.
 8 See PSR ¶ 62. Compounding the potential disruption to Ms. Moreno's dependents is the fact that
 9 her husband Fidencio is a codefendant and is facing significant prison time and potential
 10 deportation.

11 In similar circumstances, courts have affirmed sentences of probation, home confinement,
 12 or other alternative sentences so that the defendant can continue with his/her caretaking duties.
 13 See, e.g., *United States v. Lehmann*, 513 F.3d 805 (8th Cir. 2008) (affirming downward variance
 14 to probation with 6 months community confinement); *United States v. Bueno*, 549 F.3d 1176,
 15 1180-81 (8th Cir. 2008) (affirming downward departure from 37 to 46 month Guidelines range to
 16 5 months home confinement due to medical condition of defendant's spouse); *United States v.*
 17 *Menyweather*, 447 F.3d 625 (9th Cir. 2006) (affirming downward departure from Guidelines range
 18 of 21 to 27 months to probation with 40 days of probation to be served on consecutive weekends
 19 in a "jail-type institution"), *overruled on other grounds*, 621 F.3d 967 (9th Cir. 2010); *United*
 20 *States v. Leon*, 341 F.3d 928, 932 (9th Cir. 2003) (affirming downward departure from 27 to 33
 21 months to 8 months incarceration and 8 months home detention).

22 In recognition of the seriousness of her actions, Ms. Moreno is not seeking straight
 23 probation or home confinement. However, Ms. Moreno's respectfully submits that a sentence in
 24 excess of 12 months and one day would cause unwarranted harm to her dependents with no
 25 reciprocal benefit to society. As detailed by her family plan (Exhibit A), the Morenos will call
 26 upon on her sister-in-law (Arturo's wife) Delia to help take over the childcare and elder care duties
 27 Ms. Moreno will be unable to handle while incarcerated. Delia, however, has three young children
 28

1 of her own (ages 1, 5, and 7) and is facing the reality of losing her own husband to incarceration.
 2 While Delia has done what everyone hopes a family member would do by stepping up to take on
 3 additional overwhelming responsibility, the reality is that it will be very difficult for Delia to take
 4 care of five children (ages 1, 5, 5, 7, and 11) as well as the elderly in-laws for longer than one year.
 5 The family's finances have been decimated by the costs of litigation and restitution payments so
 6 there is no money for hiring help or daycare. Even with Delia's care, Ms. Moreno's daughters,
 7 facing early adolescence, will suffer greatly and perhaps irreparably as a result of losing their
 8 mother to a lengthy prison term. The requested sentence, while not avoiding these devastating
 9 secondary harms, will go far in mitigating them while still fulfilling the sentencing objectives.

10 **4. The Requested Sentence Will Provide Just Punishment and There is Little
 11 Risk That Ms. Moreno Will Reoffend.**

12 Particularly because of the significant impact the criminal case has already had on her
 13 family and will continue to have on her family in the future, Ms. Moreno is exceedingly unlikely
 14 to reoffend. *See* 18 U.S.C. § 3553(a)(2)(A) & (C). Ms. Moreno's college-age children are deeply
 15 stressed and Ms. Moreno's marriage with her husband (and codefendant) is strained not only
 16 because of the impending incarceration of Ms. Moreno and her husband, but because of the shame
 17 that Ms. Moreno and her husband have experienced as they come to terms with the crimes they
 18 committed and inform their loved ones and community of their wrongdoings. Ms. Moreno is not
 19 only remorseful for her actions but has experienced deep anxiety over the impact that her and her
 20 husband's incarceration will have on her children. *See* Exhibit B (Letter from Elena Moreno);
 21 Exhibit D (Letter from Alma Morales); Exhibit F (Letter from Veronica Moreno-Castillo). Even
 22 without a prison sentence, Ms. Moreno's experience has served as a strong deterrent to any future
 23 criminal, or even reckless, behavior.

24 Despite her tumultuous youth, Ms. Moreno is a first time offender and has only two minor
 25 incidents in her criminal history (not convictions) from over 20 years ago when she was 18 years
 26 old and over 15 years ago when she was 25 years old. PSR ¶¶ 49-55. Ms. Moreno has no history
 27 of alcohol or drug abuse and has strong ties with her family and community. PSR ¶¶ 63, 66, 72. As
 28 reported by the United States Sentencing Commission, these traits make Ms. Moreno unlikely to be

1 recidivist. *See* U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History*
 2 *Computation of the Federal Sentencing Guidelines* (May 2004), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf, at Ex. 9 (female Criminal History Category I offenders have a 10%
 3 recidivism rate and Criminal History Category I offenders with no drug use have a 10.8%
 4 recidivism rate) & Ex. 10 (Criminal History Category I offenders that are legally married have a
 5 9.7% recidivism rate). Likewise, the report illustrates that a sentence longer than 12 months will
 6 not have a meaningful impact on the likelihood of Ms. Moreno becoming a recidivist. *Id.* at Ex. 12.

9 **5. The Requested Sentence Will Better Allow for Ms. Moreno to Provide
 10 Restitution to Victims of the Offense.**

11 As noted by the Probation Office, Ms. Moreno has paid in full the restitution for the tax
 12 fraud conspiracy (Count One). Currently outstanding is the restitution this Court determines Ms.
 13 Moreno must pay Wells Fargo Bank and NationStar Mortgage. Probation has determined that the
 14 restitution owed is \$219,000. Especially in light of the fact that Ms. Moreno's husband is a
 15 codefendant who has entered into an 11(c)(1)(C) plea agreement with the government for 41
 16 months of imprisonment (and may be subject to deportation after he serves his term of
 17 incarceration), the Probation Office's assessment of Ms. Moreno's ability to pay (PSR ¶¶ 79-80) is
 18 only accurate insofar as it summarizes Ms. Moreno and her husband's positive monthly cash flow
 19 for when both Ms. Moreno and her husband are out of custody. A longer term of imprisonment
 20 for Ms. Moreno will inevitably delay her ability to pay restitution, as Ms. Moreno will be unable
 21 to work during incarceration and may incur significant childcare costs during her incarceration if
 22 her request for staggered sentences is not granted or if her term of incarceration is so long that her
 23 sister-in-law Delia cannot assist with childcare for the whole period of incarceration.

24 **C. Objections to Presentence Report.**

25 **1. There is No Basis to Apply a Manager/Supervisor Enhancement.**

26 The draft presentence report did not apply a manager/supervisor enhancement to Ms.
 27 Moreno. Nonetheless, the Probation Office changed course for the final presentence report and
 28 decided to apply a manager/supervisor enhancement to Ms. Moreno with respect to Count

1 Thirteen (bank fraud conspiracy). The sole basis for this enhancement is the government’s
 2 contention that Ms. Moreno somehow supervised employees of MJ Consulting, Inc. – uncharged
 3 individuals who were hired by Ms. Moreno’s husband’s lawyer to assist them with avoiding
 4 foreclosure through loan modification. Despite the fact that the records provided by the
 5 government do not support a finding that Ms. Moreno managed or supervised the MJ Consulting
 6 employees, the presentence report adopts the government’s unsupported contentions wholesale.
 7 This is factually wrong and legally unsupportable. *See* PSR at ¶¶ 19, 37.

8 As the Ninth Circuit has observed, “conduct which may have been integral to the success
 9 of the criminal enterprise, or conduct that reflects a high degree of culpability [is] insufficient to
 10 support a leadership enhancement” *United States v. Whitney*, 673 F.3d 965, 975 (9th Cir.
 11 2012). To apply a manager/supervisor enhancement, there must be “evidence that the defendant
 12 exercised some control over others involved in the commission of the offense [or was] responsible
 13 for organizing others for the purpose of carrying out the crime.” *Id.* at 975 n.6. There is no such
 14 evidence here.

15 As described previously, the conspiracy at issue for Count Thirteen involved three
 16 immediate family members who obtained home loans to purchase homes for themselves and Ms.
 17 Moreno’s mother in law. The loans at issue were taken out from 2005 to 2007. When the
 18 Morenos fell behind on their home loan payments, Ms. Moreno’s husband sought the assistance of
 19 the Yesk Law Group/MJ Consulting Services Inc. (hereinafter “MJ Consulting”). As the MJ
 20 Consulting records provided by the government indicate, MJ Consulting has “extensive
 21 experience in loan origination and the foreclosure and securitization process” and “based on the
 22 knowledge [it] acquired over the past several years” would assist to “prosecute and defendant any
 23 anticipated legal matters” for its clients. Further, the Litigation Support Consulting Agreements
 24 between Ms. Moreno’s husband and MJ Consulting specify that MJ Consulting would work
 25 “under the supervision of our legal counsel Michael Yesk (attorney at law).” A simple PACER
 26 search reveals that since 2012, Attorney Yesk has filed over 70 federal cases against lenders and
 27 mortgage companies in the Northern District of California alone. The assertion that Ms. Moreno –
 28

1 who dropped out of high school and who had no prior experience with loan modification –
 2 somehow usurped Attorney Yesk’s role as a supervisor and managed and supervised the
 3 experienced professionals at MJ Consulting is absurd.

4 At most, Ms. Moreno served in a secretarial capacity and retrieved documents as directed
 5 by MJ Consulting. Although the government and the Probation Office make much of Ms. Moreno
 6 being the “primary contact” between MJ Consulting and the codefendants (Ms. Moreno’s husband
 7 and brother-in-law), the records at most show that Ms. Moreno was the “primary contact” for
 8 communications directed to herself and her husband. Not only is this division of labor between
 9 husband and wife meaningless for obvious reasons, but it is largely explained by Ms. Moreno’s
 10 regular access to a computer and phone during business hours (due to her office job) in contrast to
 11 her husband’s lack of such regular access (due to his job in the bus lot). Further, although the
 12 Probation Office adopts (verbatim) the government’s contention that Ms. Moreno was
 13 “responsible for managing the submission of documents supporting the fraudulent loan
 14 modification applications,” the evidence at best suggests that some (but not all) requests for
 15 documents were directed by MJ Consulting to Ms. Moreno and that Ms. Moreno would provide
 16 documents as directed. This is consistent with Ms. Moreno’s secretarial job responsibilities and
 17 her additional role as the primary housekeeper and homemaker. The notes clearly show that
 18 employees at MJ Consulting – the experts in loan modification and foreclosure defense – were
 19 responsible for determining which documents were needed and for synthesizing the raw materials
 20 obtained from the Morenos into the loan modification applications that were eventually submitted.

21 In addition to the fact that the government cannot show that Ms. Moreno supervised,
 22 managed, or had any control over the employees of MJ Consulting, there is insufficient evidence
 23 that anyone at MJ Consulting can even be considered a “participant” for purposes of § 3B1.1 in
 24 the first instance. Application Note 1 to Section 3B1.1 specifies a “participant” is “a person who
 25 is *criminally responsible* for commission of the offense, but need not have been
 26 convicted” (emphasis added). The records relied upon by the government and by the Probation
 27 Office do not even identify *who* at MJ Consulting took the notes that are being characterized as
 28

1 “evidence” (and it appears there were multiple note takers) so the name and job title of the
 2 employee who supposedly took the notes remains a mystery. As such, the unidentified employee
 3 cannot be considered to be a criminal participant and no enhancement can be applied. *See, e.g.*,
 4 *United States v. Brown*, 771 F.3d 1149 (9th Cir. 2014) (reversing application of leadership
 5 enhancement where it was not clear that defendant had controlled a particular “criminally
 6 responsible” individual); *United States v. Luca*, 183 F.3d 1018, 1024 (9th Cir. 1999) (“Unknown
 7 facilitators of crimes will not be considered criminally responsible participants.”)

8 Furthermore, even assuming that the government’s translations of the records relied upon
 9 are correct, the records cited by the government have still not been shown to be reliable
 10 evidence. We do not know who wrote the notes at issue, we do not know when the notes were
 11 written in relation to when the alleged conversations occurred, and we do not know if we can rely
 12 upon the note taker’s account of what was said – especially since the notes provide no context for
 13 the statements attributed to Ms. Moreno. Such unreliable evidence cannot be the basis to enhance
 14 Ms. Moreno’s criminal liability so significantly. More importantly, even assuming that the
 15 statements relied upon by the Probation Office and the government for the enhancement are
 16 accurate, they do not suffice to find that Ms. Moreno exercised any control over MJ Consulting or
 17 that any specific individual at MJ Consulting can be found to be a participant criminally
 18 responsible for the commission of Count Thirteen.

19 **2. There is No Basis for the Presentence Report’s Speculation that Ms. Moreno
 20 Has Had “Anger Management Issues.”**

21 The Probation Office contends that an aggravating factor for the Court to consider is Ms.
 22 Moreno’s “other criminal conduct might suggest that there was at least the possibility of
 23 underlying anger management issues in the past.” Beyond being insensitive to the history of
 24 domestic violence Ms. Moreno described during her presentence interview, this conclusion is
 25 based solely on a 1999 arrest of Ms. Moreno for an altercation with her husband. PSR at ¶ 53.
 26 There is no evidence that this incident occurred as described by the presentence report and is
 27 complicated by the fact that it occurred during a time when Ms. Moreno’s husband was abusive
 28 and suffered from severe addiction. *Id.* at ¶¶ 62, 102. To saddle Ms. Moreno with this

1 unsupported conclusion is unfair. That said, Ms. Moreno has always been amenable to counseling
2 and mental health treatment and is the first to acknowledge that depression and despondency
3 arising from the events following this case have caused her to not take care of herself as she knows
4 she should. While she has turned to counselors in her church community, she would welcome any
5 mental health treatment that the court would impose as part of her sentence.

3. There Has Been an Insufficient Showing that Forfeiture, in Addition to Restitution, is Appropriate.

The presentence report recommends that the “defendant’s interest” in at least \$3,328,600 in U.S. currency (presumably representing the value of all home loans that were part of the bank fraud conspiracy), her family’s current residence (Hillview), her mother-in-law’s former home (Chesbro), and her brother-in-law’s home (Cadiz) be forfeited to the United States. However, the presentence report’s recommendation appears to simply copy the government’s forfeiture allegations as contained in the superseding indictment and does not specify or quantify what “interest” Ms. Moreno has in the enumerated properties. This is particularly problematic given that Ms. Moreno has no property interest in Chesbro or Cadiz or the loans that were issued to purchase those properties. Further, the \$3,328,600 figure appears to encompass the value of loans for homes that have already been foreclosed on or short-sold – for which the presentence report already recommends that Ms. Moreno be required to pay restitution. Finally, all loans that are the subject of the bank fraud conspiracy were interest-only loans – so it is unclear what “interest,” if any, was obtained by any of the defendants in the loans. As it stands, the government has not made the requisite showing for this Court to order any forfeiture of property beyond what is encompassed by the Court’s restitution order.

IV. CONCLUSION

24 For the reasons stated herein, the Court is respectfully urged to implement a downward
25 variance under § 3553(a) and sentence Ms. Moreno to a term of imprisonment no greater than
26 twelve months and a day, to be served consecutively and staggered with her codefendant husband
27 Fidencio Moreno and brother-in-law Arturo Moreno. Ms. Moreno also respectfully requests that
28 her aforementioned objections to the presentence report be sustained.

1 Dated: January 14, 2015.

Respectfully submitted,

2 CLARENCE DYER & COHEN LLP

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4 By: /s/ Nanci L. Clarence

5 Nanci L. Clarence

6 Gina Moon

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Attorneys for Defendant Elena Moreno